Federal Sentencing: Grouping of Money Laundering and Fraud Counts of Conviction

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GROUPING OF MONEY LAUNDERING AND FRAUD

United States Sentencing Guideline §3D1.2 states "[a]ll counts involving substantially the same harm shall be grouped together into a single Group. Counts involve substantially the same harm within the meaning of this rule:

(a) when counts involve the same victim and the same act or transaction.

(b) when counts involve the same victim and two or more acts or transactions connected by a common criminal objective or constituting part of a common scheme or plan.

(c) when one of the counts embodies conduct that is treated as a specific offense characteristic in, or other adjustment to, the guideline applicable to another of the counts.

(d) when the offense level is determined largely on the basis of the total amount of harm or loss, the quantity of a substance involved, or some other measure of aggregate harm, or if the offense behavior is ongoing or continuous in nature and the offense guideline is written to cover such behavior.

Furthermore, §3D1.2(d) identifies a number of offenses that either are or are not to be grouped under that particular subsection, and offenses governed by §§2F1.1 and 2S1.1 are among those identified as appropriate for grouping. Furthermore, application note 6 states: "[c]ounts involving offenses to which different offense guidelines apply are grouped together under subsection (d) if the offenses are of the same general type and otherwise meet the criteria for grouping under this subsection."

A circuit split exists on the issue of whether money laundering and fraud can be grouped together. The circuits that have addressed the issue examine the grouping question predominately under subsection (b) or (d). The Third, Fifth, and Seventh Circuits have upheld the grouping of money laundering and fraud. The First, Second, Eighth, Ninth, and Tenth Circuits, however, have held that fraud and money laundering should not be grouped. The Fourth and Eleventh Circuits appear to have a case-by-case determination dependent upon whether the offenses involved were closely related and part of an ongoing or continuous scheme.

If the court groups money laundering and fraud offenses under §3D1.2(d), the court may aggregate the monetary amounts from the funds from the fraud together with the funds laundered. This can lead to a situation where a defendant will be arguing for the counts not to be grouped--if only a small portion of the funds obtained by a fraud scheme are thereafter laundered. For example, if a defendant fraudulently obtains $1,000,000 but launders only $100,000 of that money, it is better for the defendant if the counts were not grouped. Here, if the two counts are not grouped, the defendant's fraud BOL would be 19 (6 plus 11 from fraud table and 2 for minimal planning), under §2F1.1, and his money laundering BOL would be 20 (value of funds table under §2S1.1(b)(2) would not apply) under §2S1.1. After these counts were assigned units and combined under §3D1.4, the defendant would receive a combined BOL of 22. However, if the

two counts were grouped and their harm aggregated under §3D1.2(d), the defendant would receive a BOL of 25 (20 plus 5 from value of funds table, using $1.1 million as the amount of funds), under §2S1.1, which is 3 levels higher than if the counts were not grouped. Thus, grouping–which is meant to protect defendants against arbitrary additions resulting from the government's formal charging decision–would actually increase the defendant's sentence.

I. The following cases have held that grouping was appropriate:

Grouping fraud and money laundering counts pursuant to §3D1.2(b).

In *United States v. Cusumano*, 943 F.2d 305, 313 (3d Cir. 1991), *cert. denied*, 502 U.S. 1036 (1992), the Third Circuit affirmed the district court's decision to group money laundering with other offenses where "the evidence demonstrated that the unlawful kickbacks, the embezzlement, the conspiracy, the Travel Act violations and the money laundering were all part of one scheme to obtain money" from an employee benefit fund. The appellate court considered the propriety of grouping the offenses by inquiring whether the money laundering convictions and embezzlement offenses harmed the same victim. The appellate court concluded that the victim of the embezzlement offenses, as well as the laundering offenses, was the fund and its beneficiaries, and the appellate court held the offenses were part of one overall scheme to obtain money from the fund and therefore, *the offenses should be grouped under §3D1.2(b). See also, United States v. Smith*, 186 F.3d 290 (3d Cir. 1999)(grouping of fraud and money laundering under §3D1.2(b)).

Grouping of Fraud and Money Laundering pursuant to §3D1.2(d).

In *United States v. Leonard*, 61 F.3d 1181 (5th Cir. 1995), the district court's decision to group the defendant's fraud and money laundering offenses pursuant to §3D1.2(d*)* was upheld. The appellate court found that the money laundering and fraud from a scheme to obtain money from elderly victims constituted part of the same continuing common criminal endeavor. The appellate court noted that according to §3D1.2, the Sentencing Commission allows grouping of offenses which involve the same victim and multiple acts tied together by a common illegal objective or are part of a common scheme. The defendant, relying on decisions by the First, Ninth, and Tenth Circuits, argued unsuccessfully that the money laundering and fraud counts did not involve common victims and, therefore, did not belong in this category of grouping cases. *See United States v. Lombardi*, 5 F.3d 568 (1st Cir. 1993); *United States v. Taylor*, 984 F.3d 298 (9th Cir. 1993); and *United States v. Johnson*, 971 F.2d 562 (1992). The appellate court, rejecting this contention, held that the fraud and money laundering offenses *should be grouped under §3D1.2.* The appellate court stated that the money laundering activity was not ancillary, as it was a "single integrated scheme to obtain money from elderly victims and to use that money to facilitate the continuance of the scam. The activities cannot be neatly separated." *Id.* at 1186.
See also United States v. Powers, 168 F.3d 741 (5th Circuit), *cert. denied*, 120 S. Ct. 360 (1999); *United States v. Landerman*, 167 F.3d 895 (5th Cir.), *cert. denied*, 118 S. Ct. 638 (1999); *United States v.Tanley*, 986 F.2d 880 (5th Cir. 1993).

In *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996), the Seventh Circuit reversed and remanded the sentence of a Ponzi scheme operator on the ground that his convictions for money

laundering and mail fraud should have been *"grouped" under §3D1.2(d)* to determine his sentence under the guidelines. The defendant represented to investors that their funds were being placed into certificates of deposit, annuities, and mutual funds, but he was actually depositing the funds into a personal checking account and used them both for personal expenses and to cover interest and dividend payments owed to previous investors. The district court refused to group the money laundering and fraud counts, agreeing with the government's contention that the fraud and money laundering involved different victims--individuals and society respectively--and thus different harms. *The appellate court reversed, concluding that the mail fraud and money laundering counts should have been grouped because the money laundering served the necessary purpose of concealing the fraud, keeping the scheme afloat, and perpetuating the scheme that produced the laundered funds.* The appellate court noted that all of the money the defendant laundered was defrauded from his investors, and that without the fraud there would have been no funds to launder. Moreover, the money laundering took place in an effort to conceal the fraud and keep the entire scheme afloat. *See United States v. Emerson*, 128 F.3d 557 (7th Cir. 1997). The appellate court found that, in cases where the defendant is convicted of laundering proceeds of his fraud to conceal the source or ownership of the proceeds, "there is intuitive force to the argument that the victim of the fraud is also a victim of the transaction designed to hide or 'cleanse' the funds of which she was defrauded." Id. at 283. Furthermore, §3D1.2(d) provides that offenses governed by §§2F1.1 and 2S1.1 are appropriate for grouping because the offense level is determined largely on the basis of the total amount of harm or loss. The appellate court, accordingly, rejected the reasoning of other circuits which have held that money laundering and fraud convictions should not be grouped. *See United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992); *United States v. Lombardi*, 5 F.3d 568 (1st Cir. 1993); and *United State v. Taylor*, 984 F.2d 298 (9th Cir. 1993).

II. The following cases have held that the grouping of money laundering and fraud was inappropriate:

In *United States v. Lombardi*, 5 F.3d 568 (1st Cir. 1993), the First Circuit held that it was proper for the district court not to group three mail fraud counts with two money laundering counts from an insurance fraud case. The defendant argued that §3D1.2(c) provides that counts should be grouped together when one of the counts embodies conduct that is treated as a "specific offense characteristic" in one of the other counts. Because knowledge that the money laundered funds were derived from mail fraud was a "specific offense characteristic" in the Guideline applicable to the money laundering counts, the defendant claimed that all five counts related to conspiracy, mail fraud and money laundering be grouped together. The appellate court disagreed, and *held that USSG §3D1.2(c) did not apply in the instant case.* The appellate court noted that the "conduct" embodied in the mail fraud counts related to various acts constituting the frauds, coupled with the requisite intent to deceive. The "specific offense characteristic" in §2S1.2(1)(b) is knowledge that the funds being laundered are the proceeds of a mail fraud. It happens that the defendant's knowledge of the funds' source was derived from the fact that he committed the frauds, but that does not make the fraudulent acts the same thing as knowledge of them. The appellate court reasoned that one who commits a fraud and launders the money (thereby knowing of its source) is normally more culpable than one who merely launders the money knowing of its source.

Furthermore, the court added the victim of fraud was the insurance company, and the victim of money laundering was society.

Furthermore, in *United States v. Kneeland*, 148 F.3d 6 (1st Cir. 1998), the First Circuit held that it was proper for the court not to group the defendant's fraud and money laundering convictions from a fraudulent loan transaction scheme. The appellate court held that §3D1.2(d) applies in circumstances in which the offense level for a given set of counts is determined largely on the basis of the total amount of harm or loss. The appellate court stated that in this case at least, the offense level for money laundering was not based on an aggregate harm, and thus does not fall within the purview of subsection (d). The appellate court concluded that subsection (d) does not encompass the defendant's fraud and money laundering convictions because the offense level for money laundering is generally not determined on the basis of total harm.

In *United States v. Napoli*, 179 F.3d 1 (2d Cir. 1999), *cert. denied*, No. 99-5396 (U.S. Feb. 22, 2000), the Second Circuit, affirmed the district court's decision that in this case, that *money laundering and fraud should not be grouped*. The defendant was convicted of conspiracy, wire-fraud, bank fraud, and money laundering violations. The appellate court noted the split among the circuits, and joined with the circuits that have held that money laundering and fraud should not be grouped together. The appellate court rejected the defendant's argument that money laundering and fraud should be grouped under §3D1.2(b) because the fraud and money laundering counts involve different harms to different victims. The appellate court also rejected the defendant's argument that the fraud and money laundering counts should have been grouped under §3D1.2(d). The court noted that Application Note 6 to §3D1.2 states that two counts that measure harm in quantities should only be grouped if the counts are also of the "same general type." Also, the Introductory Commentary to Chapter Three, Part D directs that with regard to different guidelines that measure harm in monetary values, counts should be grouped, and their numerical quantities added, only when the "offense guidelines for the two counts base the offense level primarily on the amount of money involved. The court noted that fraud is an offense whose sentence is largely based on the amount of loss because its BOL is 6, but the offense level may increase by 18 levels depending on the total amount of loss. The court contrasted money laundering because the BOL for money laundering is 20 or 23, and the increase due to the total laundered is at most 13 and only begins increasing when the amount laundered exceeds $100 million. Thus, even for the largest money laundering scheme, the total offense level will be based on primarily on the base offense level. Therefore, because the guidelines for fraud and money laundering measure different types of harms and measure them in different ways, the court concluded that money laundering and fraud should not be grouped together under subsection (d). *See United States v. O'Kane* 155 F.3d 969 (8th Cir. 1998), and *United States v. Kneeland*, 148 F.3d 6 (1st Cir. 1998). The appellate court did add in a footnote that it was not addressing the situation where the function of money laundering can sometimes be so highly interwoven into a fraud scheme that the fraud victim is the direct victim of the money laundering as well, and the counts should be grouped together. *See United States v. Walker*, 112 F.3d 163 (4th Cir. 1997); *United States v. Wilson*, 98 F.3d 281 (7th Cir. 1996); *United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995).

In *United States v. Hilderbrand*, 152 F.3d 756 (8th Cir.), *cert. denied*, 119 S. Ct. 575

(1998), the Eight Circuit held that money laundering and fraud *should not be grouped under §3D1.2(d)*. The defendants were convicted of mail fraud, conspiracy to commit mail fraud, and conspiracy to launder money for their roles in an organization that offered to file claims in a purported class action lawsuit. The district court determined that the value of the funds under §2S1.1(b)(2) should be based upon the jury's money laundering forfeiture verdicts against each defendant. The government appealed the value of funds determination, arguing that the value of money laundered for purposes of §2S1.1(b)(2) should include the amount of fraud loss because of the grouping rules under §3D1.2(d). The appellate court rejected the government's contention that money laundering and fraud counts should be grouped under §3D1.2(d). The appellate court concluded that fraud and money laundering do not measure the same type of harm. The court noted: "because the base offense levels for money laundering are much higher than the base offense level for fraud it is wrong to assume that the Sentencing Commission intended to equate the amount of fraud loss with the value of money laundered for every fraudulent scheme that includes some form of money laundering." Therefore, the appellate court concluded that a sentencing court must separately determine the value of laundered proceeds attributable to each conspirator, and not just equate fraud loss with the value of the money laundered.

The Eight Circuit also held in *United States v. O'Kane*, 155 F.3d 969 (8th Cir. 1998), that money laundering and fraud should not be grouped under §3D1.2(b) because money laundering and fraud have different victims. Furthermore, the appellate court refused to group money laundering and fraud counts under subsection (d) because "on the facts before the court, the offense level for money laundering was not determined largely on the basis of the total amount of harm or loss, rather it was determined largely by the eleven level higher starting base offense level." *Id.* at 974.

In *United States v. Hanley*, 190 F.3d 1017 (9th Cir. 1999), the appellate court affirmed the district court's refusal to group the defendants' money laundering and fraud counts. The appellate court noted that it was bound by the Ninth Circuit's decision in *United States v. Taylor*, 984 F.2d 298 (9th Cir. 1993), which held that because the guidelines for wire fraud and money laundering measure harm differently, the offenses should therefore *not be grouped under §3D1.2(d)*. The defendants argued that the Ninth Circuit held in *United States v. Rose*, 20 F.3d 367 (9th Cir. 1994), that when there is complete identity between the fraudulently obtained funds and the laundered funds, that grouping is required. However, the *Hanley* court concluded that this reading of *Rose* is too broad. Here, the appellate court concluded that *Rose* stands for the proposition that when there is a complete identity between the laundered and fraudulently derived funds, the amount of the fraudulently derived funds could treated as "relevant conduct," akin to uncharged counts of money laundering, for purposes of calculating the "value of funds" under §2S1.1-- not that the fraud and money laundering counts must be grouped. Here, the appellate court held that *Rose* does not require grouping in those situations, and therefore, the district court did not err by refusing to group the defendants' wire fraud and money laundering counts.

In *United States v. Johnson*, 971 F.2d 562 (10th Cir. 1992), the Tenth Circuit held that money laundering and wire fraud *should not be grouped under §3D1.2(d)*. The defendant was found guilty of wire fraud and money laundering, and the district court grouped the counts together. The appellate court held that it was an incorrect application of §3D1.2(d) for the district court to

determine the offense level by adding the funds obtained from the wire fraud scheme to the funds used by the defendant in the money laundering offenses. The appellate court noted that §3D1.2(d) was intended to be used when the measurement of harm for one offense is essentially equivalent to the measurement of harm for other related offenses. The appellate court concluded that under §2F1.1, the guideline applicable to the wire fraud scheme, the determination of loss requires an assessment of the impact of the fraud on the individual victims; whereas, the money laundering guideline, §2S1.1, is not based on the amount of loss, but is based on the value of the funds involved in the laundering transaction. The harm from a money laundering transaction does not generally fall upon an individual, but falls upon society in general. *See United States v. Kunzman*, 54 F.3d 1522 (10th Cir. 1995); *United States v. Allen*, 129 F.3d 1159 (10th Cir. 1997), and *United States v. Gaddis*, No 98-6273, 1999 WL 824416, (10th Cir. 1999)(unpublished).

III. The Fourth and Eleventh Circuits appear to have a case-by-case determination dependent upon whether the offenses involved were part of an ongoing or continuous scheme and closely related.

Fourth Circuit

In *United States v. Walker*, 112 F.3d 163 (4th Cir. 1997), the Fourth Circuit held that the district court *properly grouped the defendant's mail fraud and money laundering offenses .pursuant to §3D1.2(d)* The defendant, an insurance agent representing several insurance companies, diverted the funds from lump-sum annuities into his own personal bank account. The defendant pled guilty to nine counts of mail fraud for sending fictitious purchase confirmations, account statements and interest payments to his defrauded customers, and three counts of money laundering, pursuant to 18 U.S.C. § 1956(a)(1)(A)(i). The district court grouped the counts together pursuant to §3D1.2(d) and applied the higher base offense level for money laundering pursuant to §3D1.3(b).

The Fourth Circuit noted that §3D1.2(d) expressly permits the grouping of offenses under the fraud and money laundering guidelines, but any grouped offenses must be "closely related." The defendant argued that the court should follow the reasoning in *United States v. Porter*, 909 F.2d 789, 792-793 (4th Cir. 1990) where the court found that the grouping of gambling and money laundering charges was inappropriate. However, the appellate court noted that the Porter court added that there would be situations where grouping was possible: "[o]ne could envision an illegal enterprise which generated monies through illegal . . . activities and simultaneously laundered those monies as part of the same continuing transaction or common scheme." Id. at 793. In Walker, the appellate court concluded that the defendant conceded the offenses were closely related when he pled guilty to money laundering under the particular provision of the statute that forbids conducting financial transactions involving the proceeds of a specified unlawful activity "with the intent to promote the carrying on of the specified unlawful activity." (18 U.S.C. § 1956(a)(1)(A)(i)). Thus, the money laundering and mail fraud counts were properly grouped. Furthermore, the appellate court concluded that it was proper for the district court to use the amount of money the defendant obtained through mail fraud as the basis for calculating the value of funds under §2S1.1(b)(2)(E).

However, in an unpublished case, *United States v. McMahon*, 133 F.3d 918 (4th Cir

1997)(unpublished), the Fourth Circuit held that money laundering, fraud, false statements, and tax offenses *should not be grouped* together under §3D1.2(d) because the defendant's money laundering, tax offenses, and false statements did not serve to perpetuate the fraud. The appellate court concluded that the defendant's offenses did not constitute an ongoing scheme for purposes of §3D1.2(d) because the offenses did not involve substantially the same harm as contemplated by §3D1.2.

But see United States v. Filippi, 172 F.3d 864 (4th Cir. 1999)(unpublished)(defendant's money laundering and fraud convictions from a vocational rehabilitation billing scheme should not be grouped together because it appears that most, if not all, of the money was used for personal use, and not for furthering the fraudulent scheme).

Eleventh Circuit

In *United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995), *cert. denied*, 517 U. S. 1112 (1996), the Eleventh Circuit held, in a Ponzi scheme case, that money laundering and fraud convictions *should be grouped under USSG §3D1.2(d)*, because money laundering and fraud are closely related. The appellate court stated: "[t]hey are the same general types of offenses because both the fraud and money laundering were internal cogs in continuing the scheme." *Id.* at 1564. The appellate court noted that without the fraud there would have been no funds to launder, and that laundering money by returning false profits to some investors and paying expenses to maintain a facade of success enabled the defendant to attract new investors and keep old investors from discovering his deceit. The appellate court concluded that in determining the specific offense characteristic under the money laundering guideline a court is required to consider the total amount of funds that it believed was involved in the course of criminal conduct. Thus, the amount of money collected through fraud was co-extensive with the sums involved in the charged and uncharged money laundering counts and was therefore, the total amount of funds involved in the ponzi scheme.

However, In *United States v. McClendon*, 195 F.3d 598 (11th Cir. 1999), the Eleventh Circuit concluded that fraud and money laundering *should not be grouped* in this case. The defendant pled guilty to conspiracy to commit Medicaid fraud and money laundering. The district court declined to group the fraud and money laundering counts, and the defendant appealed, arguing that the counts should have been grouped pursuant to §3D1.2(d). The appellate court stated that the Eleventh Circuit has, in at least one circumstance, allowed the grouping of fraud and money laundering. *See United States v. Mullens*, 65 F.3d 1560 (11th Cir. 1995). In *Mullens*, the court concluded that both the fraud and money laundering were integral cogs in continuing the scheme and as a result, grouping was appropriate. *See also United States v. Adams*, 74 F.3d 1093 (11th Cir. 1996). However, the court here, distinguished *Mullens*, because the laundered funds here were not an integral part of the fraud scheme, and thus not so closely related as to warrant grouping. The appellate court noted that the money laundered in this case was not used as a means to lure new victims into the scheme. Instead it appears that much of the $3.3 million dollars at issue was funneled to the defendant's other businesses or withdrawn for personal use. Also, although the transfer of funds between accounts made it difficult to trace the proceeds of the fraud,

the main connection between the laundered funds and the fraud scheme is that the money represented the proceeds of the fraud. To find this connection alone to justify grouping would mean to that every act of money laundering would be closely related to the underlying crime which produced the money to be laundered. Such a result was not contemplated by the Guidelines. *See United States v. Harper*, 972 F.2d 321 (11th Cir. 1992)(money laundering and drug trafficking counts not grouped because the offenses were not found to be of the same general type, and the offenses not closely related).

In the following cases the district court grouped money laundering and fraud offenses, however, the appellate court did not consider the propriety of the grouping decision on appeal:

- *United States v. Sokolow*, 91 F.3d 396 (3d Cir. 1996), *cert. denied*, 519 U.S. 1116 (1997);
- *United States v. Haun*, 90 F.3d 1096 (6th Cir. 1996), *cert. denied*, 519 U.S. 1059 (1997);
- *United States v. Leahy*, 82 F.3d 624 (5th Cir. 1996);
- *United States v. Calozza*, 125 F.3d 687 (9th Cir. 1997).